LEE NYAN HON & BROTHERS SDN BHD A

v.

METRO CHARM SDN BHD

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: A-02-515-2007]
3 SEPTEMBER 2009 C

LAND LAW: *Tenancy - Construction - Claim by plaintiff against defendant for breach of contract and trespass - Whether plaintiff precluded from pursuing its action due to breach of express covenants contained in tenancy agreement - Whether ss. 7 and 8 Specific Relief Act 1950 could be invoked - Exemplary and aggravated damages - Liability - Proper and lawful termination of agreement - Public policy* D

LANDLORD AND TENANT: *Tenancy - Construction - Claim by plaintiff against defendant for breach of contract and trespass - Whether plaintiff precluded from pursuing its action due to breach of express covenants contained in tenancy agreement - Whether ss. 7 and 8 Specific Relief Act 1950 could be invoked - Exemplary and aggravated damages - Liability - Proper and lawful termination of agreement - Public policy* E

CONTRACT: *Tenancy agreement - Construction of agreement - Claim by plaintiff against defendant for breach of contract and trespass - Whether plaintiff precluded from pursuing its action due to breach of express covenants contained in tenancy agreement - Whether ss. 7 and 8 Specific Relief Act 1950 could be invoked - Exemplary and aggravated damages - Liability - Proper and lawful termination of agreement - Public policy* F G

Pursuant to a tenancy agreement dated 5 February 2001 ('agreement') the defendant, as the landlord, rented out a piece of vacant land to the plaintiff. The purpose of the tenancy was to H set up an entertainment outlet upon the terms and conditions contained in the agreement. Clause 5.5 of the agreement contained a covenant that the plaintiff shall comply with all statutes, ordinances or regulations, present or future, affecting or relating to the use of the land, and that the erection of all I structures on the land shall comply with the requirements of any authority having jurisdiction over or in respect of the land.

Pursuant to cl. 5.9 of the agreement, the plaintiff covenanted, *inter alia*, not to use the land for any unlawful purpose. The defendant subsequently terminated the agreement for non-payment of rental, took possession of the land and demolished the structures that the plaintiff had caused to be erected thereon, resulting in the plaintiff suing the defendant for breach of contract and trespass. The High Court judge allowed the plaintiff's claim and ordered the defendant to pay the plaintiff RM944,228.84 as damages for trespass, but dismissed the plaintiff's claim for exemplary and aggravated damages. This was the defendant's appeal against the High Court's decision in favour of the plaintiff. The plaintiff, on the other hand, filed a cross-appeal against the dismissal of its claim for exemplary and aggravated damages. The issues requiring consideration were as follows: (i) whether upon a true construction of cll. 5.5 and 5.9 of the agreement, the plaintiff was in breach of the covenants so as to bar it from bringing an action under the agreement against the defendant; (ii) whether s. 7 read with s. 8 of the Specific Relief Act 1950 ('Act') applied to the facts of this case. It was averred by the defendant that the trial judge had erred in applying those provisions when, on the facts, they were inapplicable as the plaintiff was not the occupier of the tenanted property at the material time; (iii) whether the plaintiff had proven the defendant's liability; and (iv) whether the defendant had properly and lawfully terminated the agreement. It was contended by the plaintiff that the defendant had failed to comply with the requirements of s. 235 of the National Land Code ('NLC') and, thus, the trial judge had erred in law and in fact in holding that the agreement had been properly terminated.

Held (allowing the defendant's appeal, and dismissing the plaintiff's cross-appeal)

Per Low Hop Bing, Heliliah Mohd Yusof and Abdul Malik Ishak JJCA:

(1) The evidence had established that the plaintiff was in breach of the express covenants contained in cll. 5.5 and 5.9 of the agreement. Being the party in breach of the law – due to its failure to obtain the building approval for the construction of the building structures and the procurement of the licences to carry out the entertainment business in the building – the plaintiff was precluded from enlisting the assistance of the court. In other words, the plaintiff's illegal acts had precluded it from pursuing its action. *Ex turpi causa non oriter actio*. An

action does not arise from a base cause. Therefore, the plaintiff being the guilty party could not be permitted to take advantage of its own breach of the express covenants contained in cll. 5.5 and 5.9 of the agreement to which it had voluntarily subscribed. (paras 18, 19 & 20)

(2) In the instant appeal, the specific finding of fact was that, at the material time, the plaintiff had been served with a temporary stop-work order by Ipoh City Hall which stopped all activities on the land. Hence, the plaintiff was no longer in occupation of the land, in which case, it was not an "occupier" under s. 7(2) of the Act. Section 7(2) of the Act was, thus, inapplicable. Further, the plaintiff had been in breach of the covenants under cll. 5.5 and 5.9 of the agreement, and so in contravention of the statutes, ordinances or regulations, in which case under s. 7(3) of the Act, the plaintiff could not lawfully be in occupation of the property or part thereof. Since s. 7(2) of the Act was clearly inapplicable, the plaintiff was precluded from availing itself of the remedy of recovering possession thereof under s. 8(1) of the Act. The trial judge had therefore erred in law in invoking ss. 7 and 8 of the Act. (paras 29, 30 & 31)

(3) In order to succeed in its claim for exemplary and aggravated damages, the plaintiff, as the tenant, must prove that the defendant, as the landlord, was liable. On the facts, however, the plaintiff had failed to do so and that being the case, it was not entitled to any damages, either exemplary or aggravated. (para 83)

(4) Upon a true construction of cl. 7.1(a) of the agreement – pertaining to the punctual payment of monthly rental – there could be no doubt that the defendant was legally entitled to terminate the agreement by notice in writing. And s. 235 of the NLC applies only to registered leases under s. 221 of the NLC, registered subleases under s. 222 of the NLC thereof and tenancies exempt from registration which have been endorsed on title, under ss. 213 and 316 of the NLC thereof. Therefore, the agreement was outside the language of s. 235 of the NLC, and the defendant had properly and lawfully terminated it. (paras 41, 42, 43, 44 & 45)

(5) The plaintiff had not furnished any valid explanation for the failure to obtain various approvals from local authorities as required under specific legislation eg. operating a business at stalls and structures illegally erected without business licences. Should the court grant an order to sustain the claims instituted by the plaintiff, it would be tantamount to encouraging or even giving countenance to the plaintiff to conduct its businesses illegally or to erect structures illegally in contravention of laws, which was clearly contrary to public policy. (paras 50 & 51)

Bahasa Malaysia *Translation Of Headnotes*

Berikutan dengan sesuatu perjanjian penyewaan bertarikh 5 Februari 2001 ('perjanjian') defendan, sebagai tuan tanah, telah menyewa sebidang tanah kosong kepada plaintif. Tujuan penyewaan itu ialah untuk mendirikan sebuah tempat penghiburan atas terma-terma dan syarat-syarat yang dikandungi dalam perjanjian. Klausa 5.5 perjanjian mengandungi suatu waad bahawa plaintif akan mematuhi semua statut-statut, ordinan-ordinan atau peraturan-peraturan, sekarang atau pada masa depan, yang berkenaan atau berhubung dengan penggunaan tanah itu, dan bahawa pembinaan semua struktur-struktur atas tanah itu akan mematuhi kesemua peraturan-peraturan mana-mana pihak berkuasa yang mempunyai bidang kuasa atas atau berhubung dengan tanah itu. Berikutan dengan kl. 5.9 perjanjian, plaintif bewaad, antara lain, untuk tidak menggunakan tanah itu bagi apa-apa tujuan yang menyalahi undang-undang. Defendan kemudiannya menamatkan perjanjian kerana ketidakbayaran sewa, mengambil milikan tanah itu dan meruntuhkan semua struktur-struktur yang plaintif telah menyebabkan dibina di atas tanah itu, mengakibatkan plaintif mendakwa defendan bagi pelanggaran kontrak dan pencerobohan. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan mengarahkan defendan membayar kepada plaintif RM944,228.84 sebagai gantirugi untuk pencerobohan, tetapi menolak tuntutan plaintif untuk gantirugi teladan dan teruk. Ini merupakan rayuan defendan terhadap keputusan Mahkamah Tinggi yang berpihak kepada plaintif. Plaintif, sebaliknya, memfail suatu rayuan balas terhadap penolakan tuntutannya untuk gantirugi teladan dan teruk. Isu-isu yang perlu dipertimbangkan adalah seperti berikut: (i) sama ada atas pentafsiran betul kll. 5.5 dan 5.9 perjanjian, plaintif telah melanggar waad-waad yang menyebabkannya dihalang dari

mengemukakan sesuatu tindakan di bawah perjanjian terhadap defendan; (ii) sama ada s. 7 dibaca bersama-sama dengan s. 8 Akta Relief Spesifik 1950 ('Akta') terpakai kepada fakta-fakta kes ini. Ia telah dikatakan oleh defendan bahawa hakim perbicaraan telah khilaf dalam memakai peruntukan-peruntukan itu apabila, atas fakta-fakta, mereka tidak boleh dipakai disebabkan plaintif bukan penghuni hartanah yang disewa pada masa yang material; (iii) sama ada plaintif telah membuktikan liabiliti defendan; dan (iv) sama ada defendan telah menamatkan perjanjian dengan betul dan mengikut undang-undang. Ia telah dihujah oleh plaintif bahawa defendan telah gagal mematuhi keperluan-keperluan s. 235 Kanun Tanah Negara ('KTN') dan, oleh itu, hakim perbicaraan telah khilaf secara undang-undang dan secara fakta dalam memutuskan bahawa perjanjian telah ditamatkan dengan betul.

Diputuskan (membenarkan rayuan defendan, dan menolak rayuan balas plaintif)
Oleh Low Hop Bing, Heliliah Mohd Yusof dan Abdul Malik Ishak HHMR:

(1) Keterangan telah membuktikan bahawa plaintif telah melanggar waad-waad nyata yang dikandungi dalam kll. 5.5 dan 5.9 perjanjian. Oleh kerana plaintif merupakan pihak yang melanggar undang-undang – disebabkan kegagalannya untuk memperolehi kelulusan bangunan bagi pembinaan struktur-struktur bangunan dan pemerolehan lesen-lesen untuk melaksanakan bisnes penghiburan dalam bangunan itu – plaintif dihalang dari meminta pertolongan mahkamah. Dalam kata-kata lain, perbuatan-perbuatan plaintif yang melanggar undang-undang menghalangnya dari meneruskan dengan tindakannya. *Ex turpi causa non oriter actio*. Sesuatu tindakan tidak berbangkit daripada sesuatu kausa keji. Oleh yang demikian, plaintif sebagai pihak yang bersalah tidak boleh dibenarkan mengambil kesempatan pelanggaran waad-waad nyata yang dikandungi dalam kll. 5.5 dan 5.9 perjanjian yang telah disetujui olehnya dengan rela.

(2) Dalam rayuan semasa, dapatan fakta yang khusus ialah, pada masa yang material, plaintif telah diserahkan dengan satu perintah berhenti-kerja oleh Dewan Bandaraya Ipoh yang telah menghentikan semua aktiviti-aktiviti atas tanah itu. Oleh yang demikian, plaintif tidak lagi menghuni tanah itu, dan oleh itu, ia bukan satu "penghuni" di bawah s. 7(2) Akta. Seksyen 7(2)

Akta oleh itu tidak boleh dipakai. Tambahan lagi, plaintif telah melanggar waad-waad di bawah kll. 5.5 dan 5.9 perjanjian dan oleh yang demikian telah melanggar statut-statut, ordinan-ordinan atau peraturan-peraturan, dan dalam keadaan tersebut di bawah s. 7(3) Akta, plaintif tidak boleh mendiami hartanah itu atau sebahagian daripadanya secara sah. Oleh kerana s. 7(2) Akta jelas tidak boleh dipakai, plaintif telah dihalang dari menggunakan remedi untuk mendapat kembali milikan di bawah s. 8(1) Akta. Hakim perbicaraan oleh itu telah khilaf di sisi undang-undang dalam menggunakan ss. 7 dan 8 Akta.

(3) Untuk berjaya dalam tuntutannya untuk gantirugi teladan dan teruk, plaintif, sebagi penyewa, mesti membuktikan bahawa defendan, sebagai tuan tanah, adalah bertanggungjawab. Walau bagaimanapun, atas fakta-fakta, plaintif telah gagal berbuat demikian dan dalam keadaan tersebut, ia tidak berhak mendapat apa-apa gantirugi, sama ada teladan atau teruk.

(4) Atas pentafsiran betul kl. 7.1(a) perjanjian – berkenaan dengan pembayaran tepat sewa bulanan – tidak ada apa-apa keraguan bahawa defendan berhak di sisi undang-undang untuk menamatkan perjanjian melalui notis bertulis. Dan s. 235 KTN hanya terpakai kepada pajakan berdaftar di bawah s. 221 KTN, pajakan bawahan berdaftar di bawah s. 222 KTN dan penyewaan-penyewaan yang dikecualikan dari pendaftaran yang telah diendors atas hakmilik, di bawah ss. 213 dan 316 KTN. Oleh itu, perjanjian terletak di luar dari bahasa yang dimaksudkan oleh s. 235 KTN, dan defendan telah menamatkannya dengan betul dan mengikut undang-undang.

(5) Plaintif tidak menyediakan apa-apa penjelasan yang sah atas kegagalannya untuk memperolehi beberapa kelulusan-kelulusan dari pihak berkuasa tempatan seperti yang diperuntukkan di bawah perundangan khusus, misalnya, mengendalikan satu perniagaan pada gerai-gerai dan struktur-struktur yang didirikan secara menyalahi undang-undang tanpa lesen-lesen perniagaan. Jikalau mahkamah memberi suatu perintah yang membenarkan tuntutan-tuntutan yang dimulakan oleh plaintif, ia akan sama seperti menggalakkan ataupun menyokong plaintif untuk menjalankan perniagaan yang menyalahi undang-undang atau untuk membina struktur-struktur yang melanggar undang-undang, yang jelas merupakan bertentangan dengan polisi awam.

Case(s) referred to:

Archbolds (Freightage), Ltd v. S Spanglett, Ltd (Randall Third Party) [1961] 1 All ER 417 ***(refd)***

Benmax v. Austin Motor Co, Ltd [1955] 1 All ER 326 ***(refd)***

Bradford City Metropolitan Council v. Arora [1991] 2 QB 507 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Clunis v. Camden and Islington Health Authority [1998] QB 978 ***(refd)***

Dr Harjit Singh v. Suhaimi Samat & Anor [1995] 1 LNS 62 HC ***(refd)***

Drane v. Evangelou And Others [1978] 1 WLR 455 ***(refd)***

Er Eng Hock & Anor v. New Kim Eng Etc [2000] 1 CLJ 289 HC ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Great Western Railway And Midland Railway v. Bristol Corporation [1918] 87 LJ Ch 414 ***(refd)***

Hay or Bourhill v. Young [1943] AC 92 ***(refd)***

Holman ET AL' v. Johnson, alias Newland [1775] 98 English Reports, 1 Cowp. 342 ***(refd)***

In re An Arbitration v. Mahmoud and Ispahani [1921] 2 KB 716 ***(refd)***

L Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 ***(refd)***

Leasing Corporation Sdn Bhd v. Indah Lestari Sdn Bhd [2007] 6 CLJ 548 CA ***(refd)***

Metro Charm Sdn Bhd v. Lee Nyan Hong & Brothers Sdn Bhd & Anor [2008] 7 CLJ 60 HC ***(refd)***

New Zealand Shipping Company Ltd v. SDAECD France [1919] AC 1 ***(refd)***

Nur Islam Worldwide Industries Sdn Bhd v. Yee Kok Sum [2001] 7 CLJ 494 HC ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***

Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 23 FC ***(refd)***

Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***

Rookes v. Barnard And Others [1964] AC 1129 ***(refd)***

Sallows v. Griffiths [2001] FSR 15 ***(refd)***

Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724 ***(refd)***

SME Aerospace Sdn Bhd v. STEYR Mannlicher (M) Sdn Bhd [2006] 5 CLJ 121 HC ***(refd)***

Su Wee Lip @ Philip Su v. Haji Lassim Abdul Rahman [2009] 1 MLJ 580 CA ***(refd)***

The Topps Co Inc v. Mally Jaya Sdn Bhd [1998] 5 MLJ 744 ***(refd)***

Toll (FGCT) Pty Limited v. Alphapharm Pty Limited And Others [2004] 219 CLR 165 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 125(1)
Contracts Act 1950, ss. 24, 33
National Land Code, ss. 213, 221, 222, 235, 316
Specific Relief Act 1950, ss. 7(1), (2), (3), 8(1)

Road and Rail Traffic Act 1933 [UK], s. 1(1)

Other source(s) referred to:
Judith Sihombing, *The National Land Code, A Commentary,* 2002, para 3454

For the defendant/appellant - Datuk N Chandran (Philip Koh, Chan Kok Keong, Yap Boon Hau, Leong Cheok Keng & Ranjan Chandran with him); M/s Leong & Tan
For the plaintiff/respondent - Vijaya Segaran (Lee Soon Ming & Danial Rahman with him); M/s Maxwell, Kenion, Cowdy & Jones

[Appeal from High Court, Ipoh; Civil Suit No: 22-76-2001]

[Editor's note: For the High Court judgment, please see Metro Charm Sdn Bhd v. Lee Nyan Hon & Brothers Sdn Bhd & Anor [2008] 7 CLJ 60.]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal And Cross-Appeal

[1] On 21 May 2007, the learned judge of the Ipoh High Court:

(1) allowed the claim of the respondent ("the plaintiff") and ordered the appellant ("the defendant") to pay the plaintiff the sum of RM944,228.84, as damages for trespass, together with interest at 8% p.a. from the date of judgment to the date of realization, and costs, but dismissed the plaintiff's claim for exemplary and aggravated damages; and

(2) dismissed with costs the defendant's counterclaim against the plaintiff.

[2] The defendant has now appealed against the decision of the High Court given in favour of the plaintiff.

[3] On the other hand, the plaintiff has filed a cross-appeal against the dismissal of the plaintiff's claim for exemplary and aggravated damages.

Finding Of Facts

[4] The narrative of the relevant facts, as found by the learned judge after a full trial, may be unfolded below.

[5] Pursuant to a tenancy agreement dated 5 February 2001 ("the agreement") the defendant as landlord let to the plaintiff, as tenant, the vacant land held under HS(D) KA 81943, No. P.T. 162011, in the mukim of Hulu Kinta, district of Kinta, Perak ("the land") for a term of three years commencing 15 December 2000 at a monthly rental of RM3,500, with an option to renew for a further period of two years. The purpose of the tenancy was to set up an entertainment outlet, upon the terms and conditions contained in the agreement.

[6] On 2 February 2001, the plaintiff paid the defendant a sum of RM7,000 being the rental for two months *viz* December 2000 and January 2001; and a further sum of RM21,000 as security deposit.

[7] Clause 5.5 of the agreement contains a covenant that the plaintiff shall comply with all statutes, ordinances or regulations, present or future, affecting or relating to the use of the land, and that the erection of all structures on the land shall comply with the requirements of any authority having jurisdiction over or in respect of the land. (A reference hereinafter to a clause is a reference to that clause in the agreement).

[8] Pursuant to cl. 5.9, the plaintiff covenanted, *inter alia*, not to use the land for any unlawful purpose.

[9] The defendant had on 28 March 2001 taken possession of the land and demolished the structures which the plaintiff had caused to be erected thereon.

[10] Other facts will appear under the relevant issues for determination later in our judgment.

Plaintiff's Covenants

[11] Defendant's learned counsel Datuk N Chandran (assisted by Mr Philip Koh, Mr Chan Kok Leong, Mr Yap Boon Hau, Mr Leong Cheok Keng and Mr Ranjan Chandran) submitted for the defendant that the plaintiff has failed to fulfil its covenants in that the plaintiff had not obtained the approval of the relevant authority to erect the structures on the land; and the licences from the authorities for the purpose of carrying on the entertainment outlet.

[12] Mr Vijaya Segaran (Mr Lee Soon Ming and Mr Danial Rahman with him) argued that the plaintiff's notice of termination was simply based on a failure to pay rental, and nothing turned on the plaintiff's failure to obtain the approval or licences, as a result of which the defendant was estopped from raising the illegality issue.

[13] The above conflicting submissions call for the determination of the following question:

> Upon a true construction of cl. 5.5 and cl 5.9 of the tenancy agreement, is the plaintiff in breach of the covenants pertaining to compliance with all statutes, ordinances or regulations, present and future, affecting or relating to the use of the land, and not to use the land for any unlawful purpose, so as to bar the plaintiff from bringing an action under the agreement against the defendant?

[14] The determination of this question revolves around the construction of the covenants contained in cl. 5.5 and cl. 5.9, in the light of the evidence adduced at the trial.

[15] Clause 5.5 and cl. 5.9 had been referred to above and would require no repetition here.

[16] In relation to the evidence adduced at the trial, Lee Gim Aik (PW1), a director of the plaintiff, testified that:

(1) The business which the plaintiff had carried on in the building structures erected on the land was a Balinese concept Cafe called Bali-Bali Cafe; and

(2) The plaintiff had not obtained the building approval before it commenced the erection thereof.

[17] Cross-examination of PW1 confirmed that:

(1) From the beginning, PW1 was informed by, *inter alia*, the defendant that erection of building structures on the land must have the permission of Ipoh City Hall which is the local authority entrusted with the task of approving planning and/or construction on site;

(2) For the public house, there was a need for liquior licence, an entertainment licence, and consent from various departments such as Fire Services Department, the Police, the District Offices of Ipoh and Batu Gajah, and the Customs Department to pay the 5% service tax;

(3) The plaintiff was required to comply with the conditions before being allowed to run the Cafe;

(4) After inspection by the Ipoh City Hall, several conditions for business licence had not been fulfilled yet;

(5) In November and December 2000, there was no approved building plan to commence construction of the Cafe; and

(6) When the defendant recovered possession of the land on 28 March 2001, the plaintiff did not have the approved building plans; but merely a "conditional approved letter" from Ipoh City Hall, which had meanwhile served on the plaintiff a temporary stop-work order which stopped all activities on the land and which still remained in force as at 28 March 2001. Hence, the plaintiff was no longer in occupation of the land.

[18] In our view, the evidence has established that the plaintiff was in breach of the express covenants contained in cl. 5.5 cl. 5.9 *supra*. Being the party in breach of the law, due to its failure to obtain the building approval for the construction of the building structures and the procurement of the licences to carry out entertainment business in the building, the plaintiff is precluded from enlisting the assistance of the court. In other words, the plaintiff's illegal acts had precluded the plaintiff from pursuing its action: *ex turpi causa non oriter actio*. An action does not arise from a base cause: see "Latin for Lawyers".

[19] This clear and well recognized legal maxim is founded in good sense. No court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising out of a contract or transaction which is illegal, and the illegality is duly brought to the notice of the court, and the person invoking the

aid of the court is himself implicated in the illegality, even if the defendant has not pleaded the illegality. So long as the evidence adduced by the plaintiff proves the illegality, the court will not assist him: per Lindley LJ in *Scott v. Brown, Doering, McNab & Co.* [1892] 2 QB 724, 728. See also s. 24 of the Contracts Act 1950.

[20] The plaintiff being the guilty party cannot be permitted to take advantage of its own breach of the express covenants contained in cl. 5.5 and cl. 5.9 to which the plaintiff has voluntarily subscribed: see eg, *Su Wee Lip @ Philip Su v. Haji Lassim Abdul Rahman* [2009] 1 MLJ 580 CA, per Gopal Sri Ram JCA, applying the judgment of Wan Hamzah SCJ who spoke for the (then) Supreme Court in *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co. Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102, and that of Lord Atkinson in *New Zealand Shipping Company Ltd v. SDAECD France* [1919] AC 1 HL.

[21] In the circumstances, our answer to the above question is in the affirmative.

Specific Relief Act 1950

[22] The defendant complained that the learned trial judge had erred in applying the provisions of ss. 7 and 8 of the Specific Relief Act 1950 when, on the facts, they are inapplicable as the plaintiff was at the material time not the occupier of the tenanted property.

(A reference hereinafter to the section is a reference to that section in the Specific Relief Act 1950).

[23] The plaintiff's response is that pursuant to the tenancy agreement, the plaintiff is an "occupier" as defined in s. 7(3); and the defendant had forcibly entered the land and destroyed the plaintiff's property without a court order, in which case, the plaintiff is entitled to claim damages from the defendant, on the basis of ss. 7 and 8.

[24] The question for determination under this head is whether the facts, as unfolded above, attract the application of s. 7 read with s. 8?"

[25] These two sections merit reproduction *in extenso* as follows:

7. Recovery of specific immovable property

(1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

(2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

(3) In subsection (2) "occupier" means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

8. Suit by person dispossessed of immovable property

(1) If the person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.

(2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.

(3) No suit under this section shall be brought against any Government in Malaysia.

(4) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

[26] In our view, s. 7(1) enables a person entitled to the possession of specific immovable property, eg, a landlord, to recover the property in accordance with civil procedural law.

[27] It is significant to note that the landlord's right to recover possession of the tenated property under s. 7(1) is subject to the situation set out in s. 7(2) which provides for the specific procedure ie, by way of proceedings in court for the recovery of possession of tenanted immovable property against the occupier thereof, and is expressly intended to cover a situation where:

A (1) There is a letting of specific immovable property under a tenancy;

(2) The tenancy is determined or has come to an end; and

B (3) The occupier continues to remain in occupation of the property or part thereof.

[28] Our courts have consistently held that s. 7(2) has relegated the remedy of self-help into oblivion. The right of the landlord to recover possession of tenanted property is to be exercised only by C way of a court action: *Dr Harjit Singh v. Suhaimi bin Samat & Anor* [1995] 1 LNS 62 HC per Haidar J (later CJ (M)); *Er Eng Hock & Anor v. New Kim Eng Etc* [2000] 1 CLJ 289 HC per Abdul Malik Ishak J (now JCA); *Nur-Islam Worldwide Industries Sdn Bhd v. Yee Kok Sum* [2001] 7 CLJ 494 per Zulkefli Makinudin J D (now FCJ); *SME Aerospace Sdn Bhd v. STEYR Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121 HC per Rosnaini Saub JC (now J); and *Metro Charm Sdn Bhd v. Lee Nyan Hong & Brothers Sdn Bhd & Anor* [2008] 7 CLJ 60 HC per James Foong J (now (FCJ).

E **[29]** Be that as it may, the third condition under s. 7(2) requires the tenant to be the "occupier" who continues to remain in occupation of the property or part thereof. In the instant appeal, as alluded to above, the specific finding of facts was that, at the material time, the plaintiff had been served with a temporary stop- F work order by the Ipoh City Hall which stopped all activities on the land. Hence, the plaintiff was no longer in occupation of the land, in which case, the plaintiff was not an "occupier" under s. 7(2). Hence, s. 7(2) is inapplicable. Further, the plaintiff had been in breach of the covenants under cl. 5.5 and cl. 5.9, and so G in contravention of the statutes, ordinances or regulations, in which case under s. 7(3), the plaintiff could not be lawfully in occupation of the property or part thereof. The learned trial judge has therefore erred in law in invoking ss. 7 and 8.

H **[30]** Although s. 8(1) enables a person, such as the tenant, who has been dispossessed, without his consent, of immovable property, otherwise in due course of law, to recover, by suit, possession thereof, the dispossession must refer to dispossession of the immovable property pursuant to the situation specifically I provided under s. 7(2).

[31] However, since the situation set out in s. 7(2) is clearly inapplicable, the plaintiff is precluded from availing itself of the remedy of recovering possession thereof under s. 8(1).

[32] Hence, we answer the above question in the negative.

Damages

[33] As the plaintiff has failed to establish liability against the defendant, there is no question of awarding damages, be it exemplary, aggravated or otherwise which the plaintiff sought in the cross-appeal.

Termination Of Agreement

[34] The next and final contention advanced for the plaintiff was that the defendant has failed to comply with the requirements of s. 235 of the National Land Code 1965 ("s. 235"), and so the learned judge had erred in law and in fact in holding that the agreement had been properly terminated.

[35] The defendant maintained that the learned trial judge was correct in concluding that the defendant had lawfully terminated the agreement, in view of the plaintiff's breach of cl. 7.1(a) pertaining to the punctual payment of monthly rental. It was further argued that s. 235 applies only to a registered tenancy, and not to the agreement herein which had not been registered nor endorsed on the title.

[36] In our view, the question that needs to be addressed hereunder is whether the defendant has properly and lawfully terminated the agreement. This issue must be determined by reference to the trial judge's finding of facts and the true construction of cl. 7(1)(a), in the light of s. 235.

[37] Clause 7(1)(a) provides for default and termination of the agreement. The relevant portion reads:

> **Default And Termination**
>
> 7.1. The landlord and the tenant hereby agree that:
>
> (a) if the monthly rental hereby reserved or any part thereof shall remain unpaid for a period of fourteen days after the same shall have become due and payable in accordance with the covenants for payment herein contained; or

A …

> Then in any one … of such events, the landlord shall at any time thereafter be entitled to terminate this agreement by notice in writing to the tenant and forfeit the security deposit paid hereunder but without prejudice to any action or other remedy which the
B landlord has or might or otherwise could have for the recovery of damages or arrears …

[38] Reverting to the facts, it is to be noted that on 28 February 2001, the plaintiff's cheque for RM3,500 was presented to the
C defendant for payment of rental for the month of February 2001. When this cheque was presented for payment on 17 March 2001, there was insufficient fund in the plaintiff's account to meet this payment, resulting in its dishonour. Subsequently, the defendant's solicitors M/s Chan & Associates, by letter dated 19 March 2001
D to the plaintiff, terminated the agreement. They declared that by virtue of cl. 7.1(a), the defendant is entitled to terminate the agreement as the monthly rental or any part thereof remained unpaid by the plaintiff for a period of 14 days after the same had become due and payable to the defendant by 1 March 2001.

E **[39]** Upon receipt of the letter, the plaintiff's employee immediately proceeded to the defendant's office to pay a sum of RM3,500, but the defendant refused to accept it. On the next day, 28 March 2001, the plaintiff through its solicitors made
F another attempt to pay the rent. This was again rejected by the defendant on the ground that the agreement had been terminated.

[40] The plaintiff then sued the defendant for breach of contract and trespass.

G **[41]** We note that when the cheque was dishonoured on 17 March 2001, the rental for the month of February 2001 was already outstanding for more than 14 days (from the due date of 15 February 2001). Clause 7.1(a) is expressed in clear and unambiguous words. The intention of the parties contained therein
H must be given effect. Upon a true construction of cl. 7.1(a), there can be no doubt that the defendant was legally entitled to terminate the agreement by notice in writing. The defendant was within its right to terminate the agreement.

I **[42]** Next, s. 235 raised for the plaintiff reads:

Notice before forfeiture

Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture or any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing:

(a) Specifying the particular breach complained of;

(b) If the breach is capable of remedy, requiring him to remedy it; and

(c) In any case other than non-payment of rent requiring him to make compensation in money for the breach.

And the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefor to the satisfaction of that person or body.

[43] Our short answer to the plaintiff's submission is that s. 235 applies only to:

(1) registered leases under s. 221 of the National Land Code 1965;

(2) registered subleases under s. 222 thereof; and

(3) tenancies exempt from registration which have been endorsed on title, under ss. 213 and 316 thereof.

[44] This proposition has been succinctly stated by Judith Sihombing in her well-researched book on *"The National Land Code, A Commentary"* (2002) at para 3454 as follows:

> This section applies to registered leases (s. 221), registered subleases (s. 222), and tenancies exempt from registration which have been endorsed on title (ss. 213 and 316).

[45] We are of the view that the plaintiff's contention on this issue is devoid of merits. The agreement in the instant appeal is outside the language of s. 235. The defendant has properly and lawfully terminated it.

[46] In the circumstances, we answer the above question in the affirmative.

Conclusion

[47] For reasons given above, the defendant's appeal is allowed. The order of the High Court against the defendant is set aside, and substituted with an order that the plaintiff's claim be dismissed with costs of RM10,000 here and in the court below. Deposit to be refunded to the defendant.

[48] The plaintiff's cross-appeal against the dismissal of the plaintiff's claim for damages, either exemplary, aggravated or otherwise, is dismissed with costs of RM2,000 to the defendant. Deposit to the defendant on account of the fixed costs.

Heliliah Mohd Yusof JCA:

[49] I have read the judgment of my learned brother Low Hop Bing JCA in draft and I agree with it.

[50] However I wish to add briefly that the plaintiff has failed to furnish any valid explanation for the failure to obtain various approvals from local authorities as required under specific legislation (eg, operating a business at stalls and structures illegally erected without business licences).

[51] Should the court grant an order to sustain the claims instituted by the plaintiff it would be tantamount to the court encouraging or even giving countenance to the plaintiff to conduct its businesses illegally or to errect structures illegally in contravention of laws and that is clearly contrary to public policy.

Abdul Malik Ishak JCA:

Introduction

[52] This judgment concerned Metro Charm Sdn Bhd as the respondent (hereinafter referred to as "the plaintiff") and Lee Nyan Hon & Brothers Sdn Bhd as the appellant (hereinafter referred to as "the defendant"). The defendant as the landlord rented out a piece of vacant land to the plaintiff by way of a tenancy agreement dated 5 February 2001. The recital to the tenancy agreement spelt out the purpose of the tenancy and that was for the setting up of an entertainment outlet based on the terms and conditions that appeared in the said agreement.

[53] *Inter alia*, it was a term of the tenancy agreement that the plaintiff as the tenant shall comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the vacant land that was tenanted, and the erection of structures shall comply with all requirements which may be given by any authority having jurisdiction or authority over or in respect of the vacant land.

[54] The plaintiff as the tenant also expressly covenanted that the vacant land shall not be used for any unlawful purpose.

[55] These were the crucial terms of the tenancy agreement and this court must give full effect to the clear intention of the parties as manifested in the said agreement. According to Lord Shaw in *Great Western Railway And Midland Railway v. Bristol Corporation* [1918] 87 LJ Ch. 414, at p. 424 that:

> ... experience has shown that the attempt seems to be inevitable in pIeader's mind ... to confuse evidence of a writer's intention as such, with the intention conveyed by the words which he employed. The latter alone is legitimate.

[56] Indeed, the "intention of the parties" is always equated with the meaning of the contract (*Toll (FGCT) Pty Limited v. Alphapharm Pty Limited And Others* [2004] 219 CLR 165). And Lord Simon of Glaisdale in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* [1974] AC 235, at p. 263 rightly applied the following pertinent passage in *Norton on Deeds* [1906], at p. 43:

> ... the question to be answered always is, 'What is the meaning of what the parties have said?' not, 'What did the parties mean to say?' ... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.

Analysis

[57] In setting up the entertainment outlet on the vacant land, the plaintiff as the tenant erected the building and set up a "Balinese concept Cafe" known as "Bali Bali Cafe". Sad to say that when the plaintiff constructed the building on the vacant land, it had not obtained the building approval. The plaintiff through Lee Gim Aik testifed that:

> We have not got building approval before we commenced building.

[58] It was a damning piece of evidence against the plaintiff. It must be understood to mean an admission by the plaintiff that it had breached an express covenant under the tenancy agreement. There was no planning approval from the Dewan Bandaraya Ipoh ("DBI").

[59] Again, there was evidence emanating from Lee Gim Aik that the pub at "Bali Bali Cafe" required liquor licence. There was also the need to secure an entertainment licence and obtain the relevant consents from various departments such as the fire brigade, the police, the district offices of Ipoh and Batu Gajah as well as the customs in order to expedite payment of the 5% service tax. In short, Lee Gim Aik knew that the plaintiff had to comply with all the statutes, ordinances or regulations present or future affecting or relating to the use of the vacant land that the plaintiff tenanted.

[60] The evidence of Lee Gim Aik was detrimental to the plaintiff. There can be no doubt that the plaintiff as the tenant had blatantly flouted the law and was in breach of the express covenants as set out in the tenancy agreement.

[61] There was no prior approval of "DBI" before the building was constructed. There was also no entertainment licences issued to the plaintiff to run and manage the "Bali Bali Cafe" in the building constructed by the plaintiff.

[62] By letter dated 19 March 2001, the defendant terminated the tenancy agreement for non-payment of rental.

[63] On 28 March 2001, the defendant as the landlord entered into the said land without any court order and sealed off the area and posted security guards. Again, on 16 April 2001 and on 17 April 2001, the defendant as the landlord through its servants or agents demolished all the structures and buildings on the said land with cranes and bulldozers. My learned brother Low Hop Bing, JCA rightly said that the remedy of self help has been relegated into oblivion by virtue of s. 7(2) of the Specific Relief Act 1950 and those assortment of cases cited by his Lordship. But when the defendant entered the said land, the tenancy agreement was already terminated by the defendant.

[64] Appellate interference should be exercised in favour of the defendant as the landlord. There was no proper evaluation of the evidence by the High Court and, consequently, there was a misdirection on the facts and the law warranting appellate interference. Wan Suleiman FJ in *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 LNS 23 speaking for the Federal Court sounded a warning that:

> it would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge.

[65] But appellate interference is encouraged and is permissible in such situations as envisaged by Gopal Sri Ram JCA (now FCJ) in *Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 3 CLJ 225 at p. 234:

> Unless we, as a court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial judge.

[66] Lord Reid in *Benmax v. Austin Motor Co., Ltd.* [1955] 1 All ER 326, at p. 329 observed as follows:

> But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

[67] In evaluating the available evidence, the plaintiff as the tenant was in clear breach of the terms of the tenancy agreement. The plaintiff had breached the express covenants of the tenancy agreement with impunity and this court will not lend its assistance to the plaintiff. It is quite apparent that the plaintiff is relying on its illegal acts in not procuring the building plan and the licence to operate the entertainment outlet in the building to advance its claim against the defendant. I have no hesitation in striking out the plaintiff's claim based on the *ex turpi causa non oritur actio* principle. It is a principle that is applicable to all causes of action

A including claims in tort. Beldam LJ delivering the judgment of the court in *Clunis v. Camden and Islington Health Authority* [1998] QB 978, CA, at p. 987 had this to say about the *ex turpi causa non oritur actio* principle:

B > But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts.

C **[68]** And Lord Mansfield in *Holman ET AL' v. Johnson, alias Newland* [1775] 98 English Reports, 1 Cowp. 342, 343 explained the *ex turpi causa non oritur actio* principle in broad terms in this way:

D > No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant,
E > but because they will not lend their aid to such a plaintiff.

[69] Statute wise, there is s. 24 of the Contracts Act 1950 which enacts as follows:

F > **24 What considerations and objects are lawful, and what not**
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any
G > law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
H >
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

I

[70] And the illustrations thereto contain examples of what would constitute lawful considerations and what would be considered unlawful and void. Hashim Yeop A Sani CJ (Malaya) had occasion to consider the legal ramifications of s. 24 of the Contracts Act 1950 in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 and this was what his Lordship said:

> Section 24 of the Contracts Act 1950 is explicit and that if an agreement is forbidden by law or prohibited by law or of such nature that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such nature that it would defeat the law then the question of public policy does not arise at all. The question of public policy arises only in para (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.

[71] It is also instructive to consider two cases involving illegality arising out of a statutory prohibition. A good starting point would be the case of *In re An Arbitration v. Mahmoud and Ispahani* [1921] 2 KB 716, CA. In that case, the plaintiff, who had a licence to sell linseed oil, sold some to the defendant in contravention of the Seed, Oils and Fats Order 1919. This statute made it an offence to buy or sell linseed oil without a licence. The defendant was unlicensed and he had induced the plaintiff to sell him the oil by a fraudulent representation that he was licensed. The defendant later refused to accept delivery of the oil and was sued for damages by the plaintiff. The Court of Appeal held that the plaintiff's claim failed because of the illegality of the contract. Despite the fact that the plaintiff was the innocent party, the legislation specifically prohibited any sale of oil to unlicensed persons.

[72] The case of *In re An Arbitration v. Mahmoud and Ispahani (supra)* should be contrasted with a situation where an innocent party sues on a contract which is not *ex facie* illegal, but which is performed by the other party in an illegal manner. The case of *Archbolds (Freightage), Ltd. v. S. Spanglett, Ltd. (Randall Third Party)* [1961] 1 All ER 417 would be a case in point. In that case, the defendants agreed to carry a load of whisky by road, from Leeds to London, for *Archbolds*. *Archbolds* were unaware that the vehicle to be used by the defendants did not have the correct licence in order to comply with s. 1(1) of the Road and Rail Traffic Act 1933. The defendants, however, were aware of this fact.

Somewhere on the route to London the goods were stolen as a result of the negligence of the defendants' driver. The defendants argued that they were not liable for damages because the contract was illegal by reason of the Road and Rail Traffic Act 1933. The court held that *Archbolds* were not debarred from recovering damages by the illegality of the defendants' use of their vehicle. *Archbolds* were innocent but that fact had not helped the plaintiff in *In re An Arbitration v. Mahmoud and Ispahani (supra)*. But *Mahmoud* can be distinguished from *Archbolds* case by virtue of the nature of the statutory prohibition. In *Mahmoud,* the contract of sale to an unlicensed person was expressly forbidden. Whereas in *Archbolds*, the carriage of *Archbolds* whisky was not as such prohibited. The Road and Rail Traffic Act 1933 merely regulated the manner in which carriers should transport goods. The contract was not, therefore, expressly forbidden by the statute and the plaintiffs were entitled to damages.

[73] In sharp contrast, here we are concerned with the tenancy agreement between the plaintiff and the defendant and the evidence showed that the plaintiff as the tenant failed to fulfil its obligations which it assumed under the tenancy agreement. The plaintiff as the tenant failed to comply with the statutory provisions affecting the vacant land and the use thereof arising from the tenancy agreement.

[74] I agree with my learned brother Low Hop Bing, JCA that the facts, as unfolded, do not attract the application of s. 7 of the Specific Relief Act 1950 read with s. 8 of the same Act.

[75] This appeal concerned the illegal performance of a perfectly legal contract. Given the specific and admitted breaches of the plaintiff as the tenant, the plaintiff was certainly disentitled to seek specific relief under the Specific Relief Act 1950. It was rightly submitted that the tenancy agreement was nothing more than an empty contract or in *latin nudum pactum*. In a gambling contract in the case of *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886, I had this to say when I was sitting on the High Court bench:

> A transaction of this nature must be void as the Malaysian law does not recognise a gambling contract. Put it in another way, the Malaysian law does not recognise gambling contracts or transactions and these are considered void. In Latin language, it is *nudum pactum*. In English, it means an empty contract. As an empty contract, no legal right or liability can arise from it.

[76] Continuing on the same page, I had this to say: A

> ... no civilised judicial system of law can sit back and smile and act nonchalantly as if nothing has happened. This court must act swiftly and strike down an illegal contract.

[77] With respect, what I said in *Pet Far Eastern* must apply with B equal force to the present appeal at hand. The Specific Relief Act 1950 do not apply to the peculiar facts of the present appeal. The building constructed by the plaintiff as the tenant was without approval of "DBI" and there was no entertainment licence issued to the plaintiff. In these circumstances, it would be next to C impossible for the plaintiff to seek the aid of this court to invoke the Specific Relief Act 1950. To confound the matter further, the tenancy as envisaged under the tenancy agreement had become impossible and, in consequence, void under s. 33 of the Contracts Act 1950. D

[78] I shall now consider the plaintiff's cross-appeal against the dismissal of the plaintiff's claim for exemplary and aggravated damages. Now, before damages can be recovered in an action there must be a wrong committed and that wrong may be in tort E or, like the present appeal, for breach of contract. Even if a loss has been incurred, damages cannot be awarded in the absence of a wrong. Lord Wright aptly said in *Hay or Bourhill v. Young* [1943] AC 92, at p. 106:

F

> Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnum absque injuria*. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff.

[79] So, the preliminary question to pose before any issue of G damages can arise is this: whether a wrong has been committed? Put differently, has the plaintiff proved the defendant's liability?

[80] The purpose of exemplary damages is to punish. And the quantum of the exemplary damages may be influenced by the size H of the compensation sought even to the extent of exceeding the size of the compensation itself. In *Rookes v. Barnard And Others* [1964] AC 1129, at p. 1228, Lord Devlin observed that:

> ... a jury shouId be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of I course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his

A outrageous conduct, to mark their dissapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

[81] In *Bradford City Metropolitan Council v. Arora* [1991] 2 QB 507, CA, the Court of Appeal while acknowledging that exemplary B damages should be awarded only where compensatory damages are inadequate to punish the defendant, upheld an exemplary award of the industrial tribunal.

[82] In *Sallows v. Griffiths* [2001] FSR 15, CA, the court refused C to order exemplary damages because it considered that the compensatory award was adequate. In *Drane v. Evangelou And Others* [1978] 1 WLR 455, CA, both Lawton and Goff LJJ thought it was justifiable to amalgamate aggravated damages with exemplary damages.

D

[83] Now, in order to succeed in its claim for exemplary and aggravated damages, the plaintiff as the tenant must prove that the defendant as the landlord was liable. Sadly, the plaintiff failed to prove the defendant's liability and that being the case, the plaintiff E was not entitled to any damages be it exemplary or aggravated.

[84] Lee Gim Aik gave evidence on two occasions. The first occasion was when he took the witness stand on behalf of the plaintiff and testified on the issue of liability. In fact, he was the F only witness for the plaintiff on the issue of liability. The plaintiff then closed its case on liability on 18 April 2002.

[85] The second occasion when Lee Gim Aik gave evidence was on 9 November 2006 on the issue of quantum. He gave evidence on behalf of the plaintiff, in his purported capacity as the director G of the plaintiff, and not in his individual capacity. Sadly, Lee Gim Aik was, as at 9 November 2006, an undischarged bankrupt, and this fact was withheld from the High Court (*The Topps Co Inc v. Mally Jaya Sdn Bhd* [1998] 5 MLJ 744, per Low Hop Bing J (now JCA)).

H

[86] In holding himself out as a director of the plaintiff at the proceedings before the High Court on 9 November 2006, and at which date the said Lee Gim Aik was already adjudged a bankrupt, the said Lee Gim Aik had acted in contravention of the I law – particularly s. 125(1) of the Companies Act 1965. His conduct in holding himself out as a director at the point of time

when he was disqualified by law from acting as a director must be construed adversely against him. The trustworthiness and the credibility of his evidence are greatly undermined (*Leasing Corporation Sdn Bhd v. Indah Lestari Sdn Bhd* [2007] 6 CLJ 548, CA, per Zulkefli JCA (now FCJ)).

[87] It goes without saying that the entire evidence of Lee Gim Aik on the issue of damages must be disregarded by this court.

[88] What is now left for me to do is to make those orders as made by my learned brother Low Hop Bing, JCA. I now make those orders accordingly.